in the particular instance does not flow from a statute, which merely enacts a method for executing the contract. The proceeding before the court to determine the benefit which the municipality has received is a full protection to the taxpayer, and likewise enforces against the municipal corporation a just demand which it, in all equity and fairness, should be made to satisfy.

A peculiar view was taken in *First Nat. Bank* v. *City of Emmetsburg,* 157 Ia. 555, where a mandatory statute was held not to apply to those contracts made by the municipality in its proprietory capacity. It is submitted that this classification is erroneous. Such a division according to the function of the municipality involved in the contract, is without reason and must result in confusion. This view is condemned in *City of Astoria* v. *Amer. La France Fire Engine Co.,* 225 Fed. 21, where the court says: "Where the city charter prescribes the manner in which contracts shall be made, this mode is obligatory whether the city is acting in a governmental or a proprietory capacity." R. E. R.

THE DISTINCTION BETWEEN PREFERENCE AND SET-OFF IN BANKRUPTCY.—Two state courts have recently handed down apparently opposing opinions on a perplexing question of bankruptcy law. In *Knoll* v. *Commercial Trust Co. of Reading* (Pa. 1915), 94 Atl. 750, a depositor, within the four months preceding his bankruptcy, gave the defendant bank, which knew of the depositor's insolvent condition, a check drawn against his account in that bank to satisfy his overdue note held by the bank. The court allowed the trustee in bankruptcy to recover the amount of the check on the theory that the giving of the check amounted to a preference within the meaning of § 60 of the Bankruptcy Act; and the court refused to sustain defendant's contention that the case should be governed by § 68 of said act, which provides for the setting off of mutual debts "between the estate of a bankrupt and a creditor."

In *Chisholm* v. *First National Bank of Leroy* (Ill. 1915), 109 N. E. 657, the depositor had overdrawn his account and thereby became a debtor to the bank. Later he made more deposits, against which the bank allowed him to check for a few days, after which it refused to honor his checks. The amount then on deposit was less than the debt due on the overdraft; and the action of the bank in refusing to honor his checks was in effect an appropriation of the amount on deposit to the partial payment of the debt due on the overdraft. About two months later, the depositor was adjudicated bankrupt. His trustee sought to recover the amount of the deposit, but the court held that the bank's appropriation of the deposit was permissible under § 68, citing and relying on *Tomlinson* v. *Bank of Lexington,* 145 Fed. 824, 76 C. C. A. 400, (another case of setting off deposits against overdrafts) and other cases.

Each of these courts decides the question purely on the authority of what it understands to be the rule adopted by the Federal Courts. The Pennsylvania court recognizes the principle laid down in *New York County National Bank* v. *Massey,* 192 U. S. 138, 24 Sup. Ct. 199, that a deposit in a bank is in no sense a payment, since it creates the relation of creditor and

debtor between the depositor and the bank, and is therefore subject to set-off. But the court holds that this right of set-off was forfeited by the bank's accepting a check from the depositor prior to bankruptcy. This decision is reached after a consideration of the following cases: *Trader's Bank* v. *Campbell,* 81 U. S. 87; *Studley* v. *Boylston National Bank,* 229 U. S. 523, 33 Sup. Ct. 806; *In re Starkweather & Albert,* (D. C.) 206 Fed. 797. The first of these three cases was decided under the Bankruptcy Act of 1867, which in respect to its provisions for set-offs and preferences is quite similar to the present act; and it was held therein that giving the bank a check within the four-month period, constituted a payment and, since the bank had knowledge of the bankrupt's financial condition, a voidable preference. But in the second of these cases the court was of the opinion that it matters not that "by checks drawn on the account or notes charged to the account the parties voluntarily made the set-off before the petition was filed," for the right of set-off has always been recognized, and "there is nothing in § 68a which prevents the parties from voluntarily doing, before the petition is filed, what the law itself requires to be done after the proceedings in bankruptcy are instituted." The giving of checks by the depositor, according to the court's further statement, is no less a set-off than is the charging of the account by the bank; for either method results in no more than a book entry. The Pennsylvania court, in *Knoll* v. *Commercial Trust Co.,* supra, points out that the Supreme Court of the United States was here speaking of a situation in which the creditor had no knowledge of the debtor's insolvency, and refuses to follow what it considers dictum, in a case where there was such knowledge. And to show that the rule announced in *Trader's Bank* v. *Campbell,* supra, is still law, (the court does not notice the fact that in the *Massey* case—192 U. S. 138 at page 146—the Supreme Court attempted to distinguish the *Trader's Bank* case) the court relies upon the case of *In re Starkweather & Albert,* supra, (decided shortly after the *Studley* case) in which it is said that the giving of a check drawn on a deposit in the bank in satisfaction of a debt owed the bank, by the depositor, is not a set-off but a payment, and therefore recoverable. The decision in this case, however, is based partly on the fact that the deposit was made only for the special purpose of paying the debt, and is doubtless correct on that ground. See comment on this case in 12 MICH. L. REV. 50. The Pennsylvania court does not cite *Ridge Avenue Bank* v. *Studheim,* 145 Fed. 798, which upholds the same position as the *Starkweather* case; nor does it refer to *Irish* v. *Trust Co.,* 163 Fed. 880, 889; *Walsh* v. *First National Bank,* 201 Fed. 522, 523, 120 C. C. A. 30, 31, and *Toof* v. *City Nat. Bk.,* 206 Fed. 250, 252, 124 C. C. A. 118, 120, which hold that the giving of a check makes no difference in the bank's right of set-off. It seems that the weight of authority is with the so-called dictum in the *Studley* case, and that the deliberate statement made by the court in that case is hardly to be overridden by the view of the Pennsylvania court.

The decisions in the two principal cases are perhaps partly reconcilable. The Pennsylvania court seems to base its objection on the fact that a check was drawn, thus making the transaction a recoverable payment instead of

a permissible set-off. *Trader's Bank* v. *Campbell,* supra and *In Re Starkweather & Albert,* supra, also state objections only to transactions in which checks were given to the creditor bank. *Ridge Ave. Bank* v. *Studheim,* supra, it is true, intimates that a set-off within four months previous to bankruptcy, is not a valid set-off within § 68 of the Bankruptcy Act. But such a transaction has been generally upheld without any attempt made to distinguish it from a set-off after bankruptcy. *Continental & Commercial Trust & Savings Co.* v. *Chicago Title & Trust Co.,* 229 U. S. 435, 33 Sup. Ct. 829; *Booth* v. *Prete,* 81 Conn. 636. It is therefore not improbable that had the facts in *Chisholm* v. *First National Bank of Leroy* been before the Pennsylvania court, the result would have been the same as that announced by the court in Illinois; for in this case the amount deposited was appropriated by the bank and the depositor gave no checks.

But it is very evident that the Illinois court would not have decided the Pennsylvania case as did the Pennsylvania court. The Illinois court, after holding a direct payment to the bank on a matured note (another element in the case) within four months of the payer's bankruptcy to be a voidable preference, says, "However, had this portion of the fund also been deposited to the general credit of the insolvent, * * * and had a check then been drawn in payment of the note the transaction would have been governed by the rule announced in * * * *Studley* v. *Boylston National Bank.*"

M. W.